(1) Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

JAMES F. SVEC d/b/a WEST SUBURBAN LIVERY and SVEC & SONS FUNERAL HOME,

Cross-Petitioner,

v.

THOMAS J. MORIARTY, Trustee on Behalf of the Trustees of the Local Union No. 727, International Brotherhood of Teamsters Pension Trust, and the Trustees of the Teamsters Local Union No. 727 Health and Welfare Trust,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction to determine representational issues and the coverage of a collective bargaining agreement when those issues have already been conclusively resolved by the National Labor Relations Board?

2. Whether a federal court has the authority to bind the non-union component of a single-employer to the terms of a collective bargaining agreement to which it is not a signatory without considering the appropriateness of the bargaining unit?

STATEMENT PURSUANT TO RULE 29.6

West Suburban Livery and Svec & Sons Funeral Home do not have a parent company and no publicly held company owns 10% or more of the stock of either entity.

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OPINIONS BELOW

The decision of the National Labor Relations Board is reported unofficially as *James Svec and Sharon Svec d/b/a West Suburban Livery and Auto Livery Chauffeurs, Embalmers, Funeral Directors, et al., I.B.T. Local 727, AFL-CIO, NLRB*, Conditional Cross-Pet., App. A at 1a -11a, Case No. 13-RM-1657. The relevant order issued by the District Court, Pet. App. D at 80a -94a, is reported as *Moriarty v. Svec*, 994 F. Supp. 963 (N.D. Ill. 1998). The Seventh Circuit's first opinion ("*Svec I*"), Pet. App. C at 22a -47a, is reported as *Moriarty v. Svec*, 164 F.3d 323 (7th Cir. 1998). The Seventh Circuit's second opinion ("*Svec II*"), Pet. App. A at 3a-21a, is reported at 233 F.3d 955 (7th Cir. 2001).

STATEMENT OF JURISDICTION

The Seventh Circuit denied Cross-Respondent's petition for rehearing and rehearing en banc on January 3, 2001, Pet. App. A at 1a. Cross-Respondent filed a timely petition for certiorari which was docketed on April 3, 2001 and, pursuant to Supreme Court Rule 12.5, Cross-Petitioner files this Conditional Cross-Petition.[1] The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1) and Rule 12.5.

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1. Cross-Petitioner filed a petition for certiorari after the Seventh Circuit's decision in *Svec I*. That petition was denied as out-of-time. This Petition is properly brought before this Honorable Court pursuant to Supreme Court Rules 12 and 13.

STATUTORY PROVISIONS INVOLVED

Section 502 of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), provides:

> A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties.

Section 9 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(b), provides:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

STATEMENT OF THE CASE

A. Introduction

The ability of the National Labor Relations Board ("NLRB") to conclusively decide representational issues regarding the appropriateness of a bargaining unit and the coverage of collective bargaining agreements is crucial to developing and maintaining a uniform national labor policy. Here, the Seventh Circuit reconsidered issues that the NLRB had already decided and reached a contrary result. Specifically, despite the NLRB's ruling after a representation hearing that West Suburban Livery ("WSL") was not bound to the collective bargaining agreement since the Union did not represent its employees, the Seventh Circuit held that WSL was bound to the collective bargaining agreement (at least to the extent of paying trust fund contributions). The Seventh Circuit improperly usurped the NLRB's authority to decide these issues and its decision conflicts with decisions of other courts of appeal. Inferior courts need guidance from this Court as to the relationship between the NLRB and the courts with respect to deciding representational issues, the appropriateness of bargaining units and the coverage of collective bargaining agreements.

B. Facts

1. Svec & Sons Funeral Home

The Svec family has owned and operated Svec & Sons Funeral Home ("the Funeral Home") for nearly a century. James has been a fifty percent owner of the Funeral Home with his sister since their father, Elmer, died on June 29, 1987. Until 1995, the Funeral Home was a member of the

Funeral Directors Services Association ("FDSA") which entered into collective bargaining agreements with the Teamsters Local No. 727 ("the Union") on behalf of its members. The Funeral Home's employees were thus represented for purposes of collective bargaining by the Union. The collective bargaining agreements called for members to make contributions to health and welfare and pension funds on behalf of covered employees. Pet., App. C at 22a-26a.

2. West Suburban Livery Service

In 1983, James purchased West Suburban Livery ("WSL"). James and his father, Elmer, eventually became partners in WSL. At no time was WSL a member of the FDSA. WSL's employees were not represented by the Union. Since his father's death, James has been a seventy-five percent owner in WSL. Cond. Cross-Pet., App. A at 2a-11a; Pet., App. C at 24a-25a.

3. The Trust Funds Sought to Recover Contributions From WSL

The Trust Funds audited the books and records of the Funeral Home and WSL. The Trust Funds claimed, among other things, that WSL owed contributions for its employees. James contested these claims. Meanwhile, the Union demanded that WSL negotiate a collective bargaining agreement covering WSL's employees. WSL responded to the Union's demand by filing an RM Petition with the NLRB on or about December 29, 1997, requesting that it conduct an election among WSL's employees to determine if they

desired to be represented by the Union.[2] This petition was docketed as *James Svec and Sharon Svec d/b/a West Suburban Livery and Auto Livery Chauffeurs, Embalmers, Funeral Directors, et al., I.B.T. Local 727, AFL-CIO, NLRB* Case No. 13-RM-1657. Pet., App. C at 22a-26a; Cond. Cross-Pet., App. A at 1a-11a.

C. Proceedings Below

On November 12, 1996, Cross-Respondent filed a lawsuit under Section 301 of the Labor Management Relations Act ("the LMRA") and Section 502 of the Employee Retirement Income Security Act ("ERISA"), seeking, *inter alia,* to collect contributions on behalf of WSL employees. While Cross-Respondent's motion for summary judgment was pending before the District Court, the NLRB conducted a two-day representation hearing regarding the Union's claim for recognition. The NLRB issued its decision on February 8, 1998. Cond. Cross-Pet., App. A at 1a-11a; Pet., App. C at 25a.

The NLRB found that WSL and the Funeral Home were a single employer, but WSL was *not* bound to the Funeral Home's collective bargaining agreement with the Union:

> [I]t did not necessarily follow from the single employer finding that the Union is the representative of [WSL's] drivers by virtue of its

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2. An employer may file a petition for an election alleging that one or more individuals or labor organizations have presented a claim to be recognized by the majority of employees in an appropriate unit as their representative for the purpose of collective bargaining. *See* 29 U.S.C. § 159(c)(1)(B).

> collective bargaining agreement with Svec & Sons [Funeral Home].

Cond. Cross-Pet., App. A at 9a. In reaching this conclusion, the NLRB found:

- WSL has never recognized or bargained with the Union;
- WSL's drivers are not encompassed in the Funeral Home unit represented by the Union;
- The doctrine of accretion cannot be applied to encompass the WSL drivers into the Funeral Home unit.

Cond. Cross-Pet., App. A at 9a-10a.

Despite having earlier advised the parties it would rule on Cross-Respondent's Motion for Summary Judgment on March 27, 1998, the District Court granted summary judgment for Cross-Respondent on Friday, February 19, 1998. The following Monday, February 21, 1998, the interim decision of the NLRB became final. Cond. Cross-Pet., App. A at 11a; Pet., App. D at 80a-94a. In contrast to the NLRB's decision, the District Court found that WSL was bound to the Funeral Home's collective bargaining agreement with the Union:

> When two businesses are actually a single employer, then both businesses will be equally liable under a collective bargaining agreement entered on behalf of only one of them.

Pet., App. D at 90a. The District Court did not cite any precedent for this proposition (indeed, there was no such authority).

James appealed the District Court's decision. The Seventh Circuit — although reversing the District Court on an unrelated issue — affirmed the order with respect to WSL's liability. Pet., App. C at 37a-44a. The Seventh Circuit reasoned that because the NLRB had no role to play in cases under Section 502 of ERISA, the District Court had properly imposed liability on WSL under the terms of the collective bargaining agreement to which the Funeral Home, but not WSL, was a signatory:

> Once the court found that WSL and the Funeral Home were a single employer, and that WSL employees performed livery services, it could impose liability "in accordance with the terms and conditions of [the] . . . agreement."

Pet., App. C at 41a-43a. Rejecting Cross-Petitioner's argument that the District Court lacked jurisdiction to decided these issues, the Seventh Circuit concluded, "[b]ecause no NLRB issue is present here, the district court's decision concerning WSL liability was well within its jurisdiction." Pet., App. D at 42a-43a. The Seventh Circuit's decision contradicts the NLRB's decision that: (i) employees of WSL were not represented by the Union at the Funeral Home; and (ii) the collective bargaining agreement between the Funeral Home and the Union did not apply to the employees at WSL.[3]

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3. The collective bargaining agreement to which the Funeral Home was a party required, *inter alia*, the employer to recognize the Union as the bargaining representative of its employees. The Trust Plans required contributions on behalf of employees represented by the Union. Pet., App. D at 100a-122a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit improperly usurped the authority of the NLRB to conclusively resolve issues relating to the representation of employees, the appropriateness of a bargaining unit and the coverage of a collective bargaining agreement. When such issues have been presented to the NLRB and ruled upon, federal courts must give deference to the NLRB's decisions. The Seventh Circuit's decision — which conflicts with decisions of other circuits — is an aberration that will undermine the Congressional goal of having uniform, national labor laws and policies administered by the NLRB. Where the respective roles of the NLRB and the federal courts are not clearly defined, an employer may find itself faced with an irreconcilable conflict and mutually exclusive instructions from the NLRB and a federal court. Such was the case here where the NLRB determined that the Union did not represent WSL's employees and that WSL had no obligations under the collective bargaining agreement towards the Union, but the Seventh Circuit concluded that WSL was bound to the collective bargaining agreement which contained a recognition clause obligating WSL to recognize the Union as the bargaining agent of its employees. The Congressional goal of a uniform national labor policy is frustrated when an employer is subjected to mutually exclusive obligations as to the same group of employees depending upon the forum — the NLRB or a federal court — where the issue is resolved.

Cross-Petitioner respectfully submits that this situation presents uniquely compelling reasons for this Court to provide the right answer to difficult questions which go to the very heart of labor law.

I.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS THAT HAVE ADDRESSED THE RESPECTIVE JURISDICTION OF THE FEDERAL COURTS AND THE NLRB TO DECIDE REPRESENTATION ISSUES

Congress, through the National Labor Relations Act ("NLRA"), has given the NLRB authority to decide the appropriateness of bargaining units. 29 U.S.C. § 159(b). This Court has thus long recognized that the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, "if not final, is rarely to be disturbed." *See Packard Motor Co. v. NLRB*, 330 U.S. 485, 491 (1947).

In *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 268 (1964), this Court held that a federal court had jurisdiction under Section 301 of the Labor Management Relations Act ("LMRA") to enforce an arbitration clause even if the contract dispute involves representational issues and "even though an alternative remedy before the Board [*i.e.*, a unit clarification petition] is available." In so doing, this Court advised employers that "[t]he superior authority of the Board may be invoked at any time." *Carey*, 375 U.S. at 272. Then, in *South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805 (1976), this Court held that a federal court lacked jurisdiction to make an initial determination of which set of employees constituted the appropriate bargaining unit where the NLRB had already assumed jurisdiction over the representational issue.

This Court explained the rationale for leaving representation issues in the hands of the NLRB as follows:

> In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under Section 9, the Court of Appeals did not give "due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution."

South Prairie, 425 U.S. at 806 (citations omitted).

Federal circuit courts have adopted inconsistent interpretations of *South Prairie* and wrestled with the incongruity of its holding with that of *Carey*. *Compare Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982), *cert. denied*, 469 U.S. 887 (1984) (concluding that a federal court is precluded from deciding the appropriateness of a bargaining unit even when the question has not been presented to the Board) *with Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) (concluding that a federal court had jurisdiction under Section 301 to determine the appropriateness of a bargaining unit where such determination was necessary to resolving an underlying breach of contract issue). Former Justice White (with whom Justice O'Connor joined) recognized the magnitude of the practical problems created by the apparently unclear meaning of *South Prairie*. *See Teamsters Local No. 70 v. California Consolidators, Inc.*, 469 U.S. 887 (1984) (dissenting from denial of certiorari and stating, "I would grant certiorari to

resolve the conflict between the Fifth and Ninth Circuits, and to avert the wider conflict likely to arise in the wake of these inconsistent decisions.").

The Seventh Circuit's decision here illustrates the conflicting results that occur when federal courts do not defer to the NLRB's "superior authority," *Carey*, 375 U.S. at 272, in representation matters. The NLRB determined that the WSL employees were not represented by the Union which represented the unit at the Funeral Home (a single employer with WSL) and WSL's employees were not covered by the collective bargaining agreement between the Funeral Home and the Union. This finding is critical because the collective bargaining agreement between the Funeral Home and the Union contains a recognition clause obligating the employer to recognize the Union as the collective bargaining representative and further obligating the employer to make contributions to the pension and health and welfare plans. If the Seventh Circuit had deferred to the NLRB's decision, Respondent's claim against WSL would have been foreclosed. Notwithstanding the NLRB's decision, the Seventh Circuit held that WSL was bound to the Funeral Home's collective bargaining agreement because it was a single employer with the Funeral Home. The Seventh Circuit determined this issue was properly decided by the District Court because the only issue was "whether the terms of the CBA entered into by the Funeral Home apply to WSL." Pet., App. C at 41a. Such a case, the Seventh Circuit concluded, "does not touch on any area of NLRB expertise." Pet., App. C at 42a.

Petitioner submits that the Seventh Circuit's decision in this case presents the unresolved issue of the authority of the federal courts to determine representational issues when

presented in connection with actions involving the interpretation of collective bargaining agreements. Since the decision in *South Prairie*, *supra*, the circuit courts have developed different approaches to address the respective roles of the NLRB and the courts when issues of contract interpretation overlap with issues of employees' representation rights. While the analyses used by the courts vary, all courts of appeal to have addressed the issue — with the exception of the Seventh Circuit — have shown deference to the NLRB's "superior authority" to decide representational issues.[4]

The Ninth and First Circuits have determined that when a federal court is deciding a breach of contract action, it does not have jurisdiction to make determinations regarding the appropriateness of the bargaining unit. *See Bhd. of Teamsters, Local 70 v. California Consolidators, Inc.*, 693 F.2d 81, 83 (9th Cir. 1982), *cert. denied*, 469 U.S. 887 (1984) (holding that the district court's jurisdiction under Section 301 did "not extend to the determination of . . . the appropriateness of the bargaining unit."); *Int'l Assoc. of Machinists (Local 2201) v. Int'l Air Service*, 636 F.2d 848, 849 (1st Cir. 1980) (the determination of the scope of the bargaining unit represented is a task "committed exclusively to the Board.").

4. Indeed, prior to this decision, at least one district court within the Seventh Circuit correctly determined that federal courts do not have jurisdiction under Section 301 to resolve representational issues by deciding bargaining units. *See Local 705, Int'l Brotherhood of Teamsters v. Willitt, Inc.*, 614 F. Supp. 932, 938 (N.D. Ill. 1985). The court in *Willitt, Inc.* observed that the NLRB's special status under the NLRA would be "subverted" if federal courts were to indiscriminately determine all representational issues. *Id.* at 937. The "threat is not only structural but substantive, for it would create doctrinal chaos, as inexperienced courts decided discretionary matters for which the [NLRA] provides little or no guidance." *Id.*

The Fourth, Fifth, Eighth and Tenth Circuits similarly agree that federal courts are precluded from revisiting a decision of the NLRB regarding representation issues. *See Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 517 n.12 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) (holding in an ERISA collection action that "the district courts may not be the proper forum for review of section 9 issues already passed upon by the Board."); *Colorado Statewide Ironworkers (Erector) Joint Apprenticeship and Training Trust Fund v. A & P Steel, Inc.*, 812 F.2d 1518, 1526-27 (10th Cir. 1987) (holding that the courts have the power to resolve representational issues "at least where the same representational question is not pending before the NLRB or where the NLRB's jurisdiction has not been invoked with respect to the dispute between the parties."); *Amalgamated Clothing & Textile Workers Union v. Facet Glass, Inc.*, 845 F.2d 1250, 1251 (4th Cir. 1988) (holding in a Section 301 action that the NLRB's decision deprived the courts of jurisdiction to decide any representation issues because "[t]hat issue is within the jurisdiction of the National Labor Relations Board."); *Local 204, Int'l Bhd. of Elec. Workers v. Iowa Elec. Light & Power Co.*, 668 F.2d 413, 420 (8th Cir. 1982) (holding in a Section 301 action that the federal district court did not have jurisdiction to revisit a prior decision of the NLRB regarding representational issues).

The unifying theme of these decisions is that the NLRB is the proper forum for the resolution of representational issues. Under this principle, a federal court should defer to the unique expertise of the NLRB where there are concurrent actions pending before the NLRB and a federal court. The First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits have properly applied this principle and issued decisions that

promote a uniform national body of labor law. The Seventh Circuit's decision is irreconcilable with these decisions, will produce inconsistent results and undermine Congressional policy regarding labor relations.

II.

THE SEVENTH CIRCUIT'S RULING THAT SINGLE-EMPLOYER STATUS EQUATES TO LIABILITY IS CONTRARY TO THE RULINGS OF OTHER CIRCUITS AND THIS COURT

In *South Prairie*, *supra*, this Court set forth a two-part test to determine if a non-union employer (such as WSL) is bound to the collective bargaining agreement of an affiliated, union-represented employer. First, the two employers must constitute a single employer and, second, the employees of the two employers must constitute a single appropriate bargaining unit.

Since *South Prairie*, the Second and Fifth Circuits have rejected the argument that a single-employer finding, *standing alone*, is sufficient to bind a non-union employer to the labor contract signed by the other (union-represented) part of the single employer. *See Lihli Fashions Corp. v. N.L.R.B.*, 80 F.3d 743, 747 (2d Cir. 1996) ("critically, the determination that separate companies are a 'single employer' is not enough to bind all the separate companies to the collective bargaining agreement of any one of the companies"); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 505 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) ("A finding of single employer status does not by itself mean that all the sub-entities comprising the single employer will be held bound by a contract signed

by only one"). Succinctly summarizing the rationale undergirding the two-part test set forth in *South Prairie*, the Fifth Circuit explained:

> It is clear that the primary motivation of the Board in making an independent unit determination in a single employer case is to protect the rights under section 7 of the NLRA, 29 U.S.C. §157, of the employees of each of the subentities constituting the single employer to bargain collectively with representatives of their own choosing.

Pratt-Farnsworth, 690 F.2d at 507. Here, the NLRB properly applied this reasoning in its decision involving WSL:

> [I]t does not necessarily follow from the single employer finding that the Union is the representative of the Petitioner's drivers by virtue of its collective bargaining agreement with Svec and Sons. . . .

Cond. Cross-Pet., App. A at 9a.

The Seventh Circuit's decision is irreconcilable with well-established principles of labor law: Before a non-union entity can be bound to a collective bargaining agreement entered into by a related entity, a determination regarding the scope of the bargaining unit must be made. *See Lihli Fashions Corp.* and *Pratt-Farnsworth, supra*. The Seventh Circuit's decision is inherently flawed because it lacked any analysis of representational issues yet bound WSL to a collective bargaining agreement to which it was not a signatory.

CONCLUSION

The respective jurisdiction of the federal courts and the NLRB is of vital importance to a stable and uniform national labor policy. The Seventh Circuit's decision is in conflict with decisions of other circuits holding that federal courts do not have jurisdiction to determine representational issues that have already been resolved by the NLRB. Likewise, the Seventh Circuit's decision regarding the effect of single-employer status directly conflicts with the decisions of the other circuits as well as this Court's decision in *South Prairie*. For all of these reasons, in the event this Court should grant the original petition it should also grant the conditional cross-petition for certiorari, summarily vacate the Seventh Circuit's decision, and remand with directions that the complaint be dismissed. Alternatively, the Court should give the case plenary consideration.

Respectfully submitted,

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APPENDIX

APPENDIX — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, REGION 13 IN *SVEC, et al. v. AUTO LIVERY CHAUFFEURS, EMBALMERS, FUNERAL DIRECTORS, et al.*, CASE 13-RM-1657 DATED FEBRUARY 9, 1998

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

Case 13-RM-1657

JAMES SVEC AND SHARON SVEC D/B/A WEST SUBURBAN LIVERY[i]

Employer/Petitioner

and

AUTO LIVERY CHAUFFEURS, EMBALMERS, FUNERAL DIRECTORS, ET AL., I.B.T. LOCAL 727, AFL-CIO

Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(*c*) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

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i. The names of the parties appear as amended at the hearing and as reflected by the record which indicates the Employer is a partnership consisting of James Svec and Sharon Svec.

Appendix

Pursuant to the provisions of Section 3(*b*) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[ii] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[iii]

3. The labor organization(*s*) involved claim(*s*) to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(*c*)(*1*) and Section 2(*6*) and (*7*) of the Act for the following reasons:

5. The West Suburban Livery, the Petitioner, filed the instant petition on the basis that the Union had made a demand to bargain on behalf of its drivers, which West Suburban Livery contends are not currently represented the Union. The Union, on the other hand, contends that West

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ii. The positions of the parties as stated at the hearing and in the parties briefs have been carefully considered.

iii. The Employer is a partnership engaged in custom livery service and also contracts to maintain equipment for other entities.

Appendix

Suburban Livery is not the true employer of the employees encompassed by the petition. Rather, the Union contends that West Suburban Livery is a single employer with Svec and Sons Funeral Home, with whom the Union has a current collective bargaining agreement covering auto livery chauffeurs. Based on its single employer contention, the Union asserts that it is the current bargaining representative of the employees encompassed by the petition and that Petitioner has not shown the Union has lost its majority status. Alternatively, the Union contends that the petitioned for unit is inappropriate as only a combined West Suburban Livery and Svec and Sons Funeral Home chauffeurs unit is appropriate. The Petitioner maintains that West Suburban Livery and Svec and Sons Funeral Home a separate entities, that a unit limited to West Suburban Livery is appropriate, and that a combined unit of Svec and Sons drivers and the West Suburban Livery drivers is not an appropriate unit, regardless of whether the Svec and Sons and West Suburban Livery are found to be a single employer.

The Petitioner, a partnership doing business as West Suburban Livery, is engaged in the business of providing custom livery service for various events, including weddings, proms and funerals. The Employer also contracts with other businesses to repair a variety of equipment including, livery vehicles, lawn equipment, tractors and snow blowers. In addition, the Employer performs detailing work on livery vehicles. James Svec is the owner of record for West Suburban Livery. He owns 75% of the partnership and handles the day to day operations of the business. His sister, Sharon Svec, owns 25% of the business. The business was originally purchased in 1983 by James Svec and his father.

Appendix

The Employer currently employs seven regularly scheduled drivers and five drivers who work on an intermittent basis.

James and Sharon Svec also own Svec and Sons Funeral Home (hereinafter referred to as "Svec and Sons" or "the funeral home"). Svec and Sons is located next door to West Suburban Livery. Svec and Sons was established in 1915 to provide death care services, including funerals and transportation and removal of decedents. Svec and Sons currently employs two full-time employees in addition to James Svec, who is in charge of the business. Svec and Sons has four vehicles: one hearse, one flower car, a courtesy car and a limousine.

Prior to around 1995, Svec and Sons was a member of the Funeral Directors Service Association of Greater Chicago (hereinafter referred to as "FDSA"). FDSA represents various funeral directors, embalmers and livery drivers. Pursuant to its membership in FDSA, Svec is bound to the terms of a collective bargaining agreement with the Union. The latest agreement is effective from March 1, 1995 through February 28, 1998. James Svec notified the Union, by letter dated November 18, 1997, that Svec and Sons had withdrawn from FDSA and that future negotiations would be solely between the funeral home and the Union. In an identical letter, written on West Suburban Livery stationery and dated March 27, 1997, James Svec notified the Union that it had withdrawn from the FDSA and that any future negotiations would be solely between the Employer and the Union. Svec testified during the hearing that West Suburban Livery has never been a member of the FDSA.

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West Suburban Livery was purchased by James Svec in 1983. Svec's father, who owned Svec and Sons at that time, loaned James Svec the money to purchase West Suburban. Since his father's demise, James Svec has run both businesses. He owns the land on which West Suburban is situated and lives in an apartment adjacent to West Suburban. As noted above, Svec and Sons Funeral Home is located just next door to West Suburban. James Svec does the hiring and firing for West Suburban and for Svec and Sons. He also assigns work to the employees. Indeed, if there are competing assignments, Svec decides which driver to send on the respective jobs. To obtain the services of West Suburban livery, customers call one of four telephone numbers: Jim Svec's home or cellular phone number, the West Suburban garage number, or the office of Svec and Sons. Upon receiving a call, Jim Svec calls the drivers to assign the trip. Which driver receives the trip depends on its duration and availability of the driver. Upon receipt of an assignment, the driver obtains a car from the West Suburban garage. Each driver has a key to the garage.

The drivers for West Suburban Livery and Svec and Sons are paid on a "trip" basis. A trip is defined as one "operation" or "one job". The average trip is four hours. Drivers for West Suburban Livery are paid $62.25 per trip. Pursuant to the terms of the collective bargaining agreement between Svec and Sons and the Union, drivers initially received $62.25 per trip. That rate increases by $2.75 for each remaining year of the contract. James Svec testified during the hearing that he determines the value of services performed by West Suburban Livery for Svec and Sons. West Suburban Livery and Svec and Sons purchase annual automobile and workers' compensation insurance from McCutcheon Insurance.

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With respect to funeral livery, West Suburban leases its vehicles to other funeral homes, including Svec and Sons, on an "as needed" basis. On occasion, Svec and Sons has leased its hearse to West Suburban at times when West Suburban drivers drove for yet another funeral home. West Suburban Livery receives approximately 25 percent of its business from Svec and Sons. During the hearing, the parties stipulated that, as of 1987, the Petitioner had no drivers and all drivers used in the course of the Petitioner's business were drivers employed by Svec and Sons, who, it appears from the record, migrated to the Petitioner's payroll.

Analysis

The parties contentions raise the issues whether the Petitioner is a single employer with Svec and Sons Funeral Home; whether the Union is the bargaining representative of the employees encompassed by the instant petition by virtue of its collective bargaining agreement with Svec and Sons Funeral Home (and, if so, whether it has lost majority support); and, whether the unit sought, being limited to drivers employed by the Petitioner is appropriate. I will first turn to the issue of whether Petitioner and Svec and Sons Funeral Home constitute a single employer as that issue permeates all the other issues in this case.

Under the Board's long-established test, single employer status is found when two nominally separate entities are actually part of a single-integrated enterprise so that, for all purposes, there is only a single employer. The Board's inquiry focuses on four factors: interrelations of operations, common management, centralized control of labor relations and common ownership or financial control. Single-employer

status does not require the presence of all four criteria, but depends upon all of the circumstances of the particular case. *Hydolines, Inc.*, 305 NLRB 416, 417 (1991); *Emsing's Supermarket*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989). However, the Board has determined that the first three factors are of particular importance, especially the centralized control of labor relations. *Id.* Applying these principles to the instant matter, I find that Petitioner and Svec and Sons Funeral Home are a single employer under the Act. Both entities are managed by James Svec. Svec handles the day to day operations of both businesses. He answers the phone and schedules livery or funeral services for customers. Customers can use any one of four phone numbers to arrange for livery service or to plan a funeral service. The business purposes of Svec and Sons and West Suburban Livery overlap to a substantial degree in that they both provide livery services: the former exclusively for funerals and the later for funerals, as well as weddings, proms, etc. In fact, many of the drivers for West Suburban Livery either formerly worked for Svec and Sons, or work there concurrently with their employment at West Suburban. The record establishes that West Suburban Livery drivers also perform maintenance on vehicles owned or leased by James Svec, as well as vehicles owned by other funeral directors.

There is substantial overlap between the functions performed by West Suburban Livery employees and employees of Svec and Sons. Indeed, at least one employee, Michael Janelli, worked simultaneously as a chapel attendant for Svec and Sons, while also driving for West Suburban Livery. Svec also testified during the hearing that there are times when he has used employees of West Suburban Livery

as drivers for Svec and Sons, although they continued to be paid by West Suburban Livery. For example, Barney Wright, a former employee of West Suburban Livery, also drove for Svec and Sons. During his employment Svec and Sons contributed to the Union's pension fund on behalf of Wright, even though he also drove for West Suburban. Similarly, employee George Canoutas drives for West Suburban and Svec and Sons. Svec and Sons makes pension contributions to the Union on behalf of Canoutas. Furthermore, James Svec testified that when West Suburban drivers drive in a Svec and Sons funeral procession, they are paid by West Suburban and Svec and Sons reimburses West Suburban for the driver's services. Within the past 12 months, at least five drivers for West Suburban have driven in a Svec and Sons funeral procession, while being paid by West Suburban. Employees for West Suburban Livery maintain the vehicles and other equipment used by employees of the funeral home. The evidence further established that Svec and Sons keeps a pickup truck and some funeral home equipment, including a tractor, snowblower and lawn mower in West Suburban's garage. The record is silent as to whether Svec and Sons pays to store its equipment in the West Suburban garage.

James Svec maintains exclusive control over labor relations for both entities as evidenced by his correspondence with the Union on behalf of Svec and Sons employees, as well as West Suburban Livery employees. The interrelatedness of the two businesses is further established by the advertisement run by West Suburban Livery in the FDSA Reference Guide and Diary. The businesses share a common clientele.

Notwithstanding the fact that the two entities maintain separate bank accounts and that they file separate income

tax returns, the realities in terms of their daily operations and common management belie the asserted existence of an arm's length relationship between the two entities. Having found that Svec and Sons uses West Suburban Livery drivers to perform services for Svec and Sons; that West Suburban uses its tools to service and maintain vehicles for Svec and Sons; and that James Svec completely controls the management and labor relations matters for West Suburban and Svec and Sons, I find that West Suburban Livery and Svec and Sons constitute a single-employer under the Act.

Having found West Suburban Livery and Svec and Sons to be a single-employer, I shall turn to the Union's contention that it is the collective bargaining representative of the Petitioner's drivers by virtue of its collective bargaining agreement with Svec and Sons Funeral Home. However, it does not necessarily follow from the single employer finding that the Union is the representative of the Petitioner's drivers by virtue of its collective bargaining agreement with Svec and Sons. The record clearly demonstrates that the Petitioner has operated with drivers since at least 1987, and that it has never recognized or bargained with the Union for those drivers. Moreover, the record shows that the Union has not taken any steps to enforce any collective bargaining agreement as to the Petitioner's drivers. There have been no dues deductions for these employees nor grievances filed for any of Petitioner's drivers. As the parties have, *de facto*, limited the unit represented by the Union to the drivers working for Svec and Sons Funeral Home, I find that the Petitioner's drivers are not encompassed in the Svec and Sons unit represented by the Union. Furthermore, as the unit employed at the Petitioner is considerably more numerous that the Union represented unit

at Svec and Sons, the doctrine of accretion can not be applied to encompass the Petitioner's drivers into the Svec and Sons unit. *Renaissance Center Partnership*, 239 NLRB 1247 (1979). See also *Central Soya Co.*, 281 NLRB 1308 (1986) and *Special Machine & Engineering*, 282 NLRB 1410 (1987). In the instant matter, while there exists a substantial community of interests amongst the drivers for Svec and Sons and for West Suburban Livery, there exists an even greater disparity between the number of represented employees at Svec and Sons versus the Petitioner's employees. Svec and Sons currently employs two drivers who are also members of the Union: James Svec and George Canoutas. On the contrary, West Suburban Livery employs seven drivers on a regular basis and five drivers on an intermittent basis. Accordingly, based on the bargaining history and the relative sizes of the unrepresented drivers at the Petitioner to the drivers at Svec and Sons, I find that the Union is not the collective bargaining representative of the Petitioner's drivers.[iv]

Finally, I turn to the Union's contention that the unit sought by the petition is inappropriate and that the only appropriate unit would include the regular drivers at both the Petitioner and Svec and Sons Funeral Home. As set forth above, the record shows that there is substantial overlap between the functions performed by the Petitioners drivers and drivers employed by Svec and Sons Funeral Home, with a number of drivers over the years driving at times for both entities. The employees

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iv. In view of my finding that the Union is not the collective bargaining representative of the Petitioner's drivers, it is not relevant and the Employer is not required to show that the Union no longer represents a majority of the employees in the unit. I have already administratively determined that the Employer has a sufficient showing of interest to support the instant petition.

work in close geographic proximately with both operations being next door to each other. James Svec provides day-to-day supervision and oversees the operations of both entities — he is in effect the only supervisor for each group of employees. Furthermore, the drivers regardless of which entity they are working for perform similar job functions, driving a vehicle. Accordingly, I find that the only appropriate unit must include the drivers of both the Petitioner and Svec and Sons Funeral Home. Inasmuch as the Petitioner seeks only a unit of drivers employed by the Petitioner, contending that a combined unit is inappropriate, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition in the above matter be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the Provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570.** This request must be received by the Board in Washington by February 23, 1998.

DATED February 9, 1998 at Chicago, Illinois.

/s/ Elizabeth Kinney
Regional Director, Region 13